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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

BRUCE COHN, individually, BRUCE COHN MANAGEMENT, INC. a California corporation. and DANJOE CORPORATION, a California corporation,
Petitioners,

v.

DAVID KATZ, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

INTRODUCTION

This petition for writ of certiorari is so utterly devoid of merit that it could be considered frivolous. This was a damage suit arising under state law for breach of an oral joint venture agreement, tried as a diversity case in the district court. Jury verdicts resulted in judgments which were affirmed by the Court of Appeals in an unpublished opinion. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals. It does not decide a federal question in a way in conflict with a state court of last resort. Indeed, it does not decide any federal question at all, nor was there any departure from the

accepted and usual course of judicial proceedings such as to call for an exercise of this court's power of supervision. In short, none of the considerations governing review on certiorari are present. (See Rule 10 of the Supreme Court Rules.)

The petition makes three arguments:

1. That the pleadings and pre-trial statement failed to give adequate notice of the issues to be tried, which were contrary to judicial admissions made by respondents;

2. That petitioners were denied due process because the reconvened jury in the second part of the bifucated trial included only six of the original eight jurors; and

3. That the trial court committed an error when, in the damages phase of the trial, it excluded petitioner Bruce Cohn's proferred testimony of his good faith in denying the existence of the joint venture agreement.

These arguments obviously do not warrant this court's consideration. Furthermore, as we will briefly demonstrate, each is wrong on the merits; the decision of the court of appeals was correct.

II

ARGUMENT

A. The Joint Venture Contract Found By the Jury to Have Been Entered Into On February 4, 1983 Was Within the Issues Framed By the Pleadings and the Pretrial Statement

(Answering the Petition for Writ of Certiorari, pp. 10-18)

The complaint alleged that the parties entered into an oral joint venture agreement on or about September 1, 1982 (Complaint ¶ 6, Appendix A-50), that it was amended in or about December 1982 (*Id.* at ¶ 7), and that in or about March, 1983, petitioner Bruce Cohn proposed several modifications to the joint venture agreement which were rejected (*Id.* at ¶ 9). The joint pretrial statement included as a disputed factual issue "whether a joint venture was formed between plaintiffs and defendants and, if so, its terms". (Joint Pretrial Statement, ¶ 2E1, Appendix A-65)

The Court of Appeals correctly rejected petitioners' claim that the jury's conclusion that the joint venture was formed in February, 1983, was outside the issues framed by these documents. (Opinion of the Court of Appeals, Appendix A-3.)

Nor were there any judicial admissions limiting formation of the contract to the fall of 1982. Respondents sued for breach of a joint venture agreement that resulted from discussions which began in the fall of 1982 and continued thereafter for a number of months. The evidence presented at the trial covered the entire course of dealing between the parties.

As the record shows, this case involved only one joint venture, the terms of which were first seriously discussed beginning in October 1982. Respondents contended that the joint venture was formed then and later modified in December 1982 but not thereafter. (R.T. 684-686, 689.) Petitioners argued that no joint venture agreement was ever reached. (R.T. 481-482.) The jury, however, choose February 4, 1983 (the date of a meeting among all of the parties and their attorneys) as the date of the agreement, presumably because the jury found that to be the date when the terms of the joint venture agreement were finally settled. (See the Amended Memorandum Opinion and Order, Appendix A-21 to A-23.)

Neither side contended that the agreement was finalized at the February 4 meeting. Respondents argued that it had been finalized earlier, and petitioners argued that it was never finalized. (R.T. 481-482.) The jury found a middle ground between those conflicting contentions, finding in respondents' favor that a joint venture agreement had been reached, but on terms less favorable to respondents than they claimed. Petitioners' argument that the complaint, pretrial statement, and arguments of counsel at trial constituted judicial admissions inconsistent with the jury's verdict adds nothing to the argument that they did not get fair notice of the issues. If petitioners' argument were accepted, it would mean that no plaintiffs' verdict could ever be sustained if the plaintiffs had argued for or alleged that the facts justified greater or different relief than that which was in fact awarded.

B. The Court Properly Re-Impaneled the Six Available Jurors for the Damages Phase of the Trial

(Answering the Petition for Writ of Certiorari, pp. 18-22)

Petitioners' argument that they were denied due process when the jury was re-impaneled for the second phase of the trial is difficult to follow. While they assert that the delay between the two trials was unfair to them, they have not offered any evidence that they were prejudiced. They suggest that they were prejudiced by the fact that only six of the eight original jurors were available for the damages phase of the trial. But all that either party was entitled to in the first place was a six person jury; eight jurors were impaneled by stipulation. (R.T. 1-19.) Petitioners expressly stipulated to the possibility of a six person jury in the event of "los[ing]" up to two jurors. (R.T. 1-19.) Petitioners argue that had their counsel "even remotely suspected that the ensuing events would in fact occur, they would have likely made different choices on peremptory challenge." (Petition For Writ Of Certiorari, pp. 21.) But petitioners do not explain why that should invalidate the stipulation that the trial would proceed with a six-person jury in the event that two were lost.[1]

Petitioners have not cited any authority for the proposition that the delay in commencement of the second phase of the trial was reversible error or constituted denial of a constitutional right. Instead, they cite cases for the proposition that it is error to order

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[1] Petitioners' argument respecting their use of peremptory challenges is indecipherable. They do not state any logical reason why their counsel would have desired to have different people on the jury if he had known that up to two jurors might be lost because they could not be located, rather than because they were ill. At one point, petitioners concede that in jury selection, ". . . precise formulas and stratagems quickly yield to visceral choice." (*Id.*) In the next breath, they suggest that the eight jurors chosen were acceptable to their counsel because of "a preceived group personality." (*Id.*) Petitioners do not explain why their counsel's "visceral choice" in choosing the eight jurors would have been different if he had known in advance that two of the jurors would not be available for the second trial. In any event, one purpose of the stipulation respecting jury size was to deal with just such eventualities.

liability and damages to be tried before *different* juries where the issues are so interwoven that confusion and uncertainty will result. (*Id.* at 20.) These cases, of course, are inapplicable here because the damages phase of the trial was not tried to a new jury but to the same jury which had heard the liability phase, less two of its members who could not be located.

In any event, under the principle cited by petitioners, the trial of the damages phase to a separate jury would not have been improper because the issue to be tried—whether respondent David Katz had sustained compensable emotional distress as a result of petitioners' breach of fiduciary duty—was not so intertwined with the liability issues as to cause confusion or uncertainty. Contrary to petitioners' argument, the "substantive good or bad faith quality of petitioners' conduct" and the "net effect of such conduct on the respondents in terms of damage, including emotional distress" were not central to both liability and damages. The first of these two issues was not presented in the damages phase of the trial,[2] and the second was not presented in the liability phase and was the only issue in the damages phase. In short, the issues presented in the two phases of the trial were separate and distinct.

The trial judge's decision to reconvene six of the eight jurors who were available for the second phase of the trial was well within his discretion. There is no evidence that it prejudiced petitioners in any respect. Petitioners are grasping at straws.

C. The Trial Court Properly Excluded Petitioner Bruce Cohn's Testimony As to His Good Faith From the Damages Phase of the Trial

(Answering the Petition for Writ of Certiorari, pp. 22-24)

In the liability phase of the trial, the jury was presented with the question whether petitioners had breached their fiduciary duty to respondents. Bruce Cohn and his witnesses testified at length to their version of the facts and no evidence of their good faith was excluded. At the conclusion of the liability phase, the jury was instructed that it was to decide "whether Bruce Cohn violated his

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[2] See section IIC, *infra*, of this memorandum.

fiduciary duty . . . to act in the highest good faith." (R.T. 4-664.) The jury then determined that respondents had breached their fiduciary duty. (See R.T. 149, Defendants/Appellant's Excerpts 69-70.)

Under California law, emotional distress damages may be awarded for intentional wrongdoing. See, e.g., *Jahn v. Brickey*, 168 Cal.App.3d 399, 407, 214 Cal.Rptr. 119, 124 (1985); *Quezada v. Hart*, 67 Cal.App.3d 754, 761, 136 Cal.Rptr. 815, 819 (1977). There is no requirement that there be a finding of bad faith or fraudulent misconduct. See, e.g., *Young v. Bank of America Nat'l Trust & Sav. Ass'n*, 141 Cal.App.3d 108, 114, 190 Cal.Rptr. 122, 126 (1983) (cited in *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1499 (9th Cir. 1986)). See also, *Pintor v. Ong*, 211 Cal.App.3d 837, 259 Cal.Rptr. 577, 581-82 (1989) (following *Young*); *Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal.App.3d 1394, 1402-03, 245 Cal.Rptr. 606, 611 (1988) (same). In the damages phase, the trial judge properly instructed the jury on the general measure of tort damages under Cal. Civ. Code Section 3333.[3]

Bruce Cohn's proferred testimony as to his good faith and reasonable belief that he owed no fiduciary duty was irrelevant at the damages phase of the trial. The trial judge did not abuse his discretion in excluding such testimony, and the jury instructions were proper.

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[3] Cal. Civ. Code Section 3333 provides in pertinent part:

> For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

III

CONCLUSION

Nothing about this case merits review by this Court. The jury findings were squarely within the issues to be tried; petitioners' jury trial right was not violated; and the trial judge did not err in excluding evidence proferred by petitioners during the damage phase of the trial. Certiorari should be denied.

Respectfully submitted,

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